

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

SPENCER PLANTATION §
INVESTMENTS, LTD. §
§
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§
§
VS. §
§
§
§
MICHAEL A. McCANN §

Case No. 3:18-CV-33

**PLAINTIFF'S RESPONSE
TO
DEFENDANT'S "MOTION FOR FRCP 12(b)(6) FAILURE TO STATE A
CLAIM"**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, and subject to its Motion to Remand, the Plaintiff, SPENCER PLANTATION INVESTMENTS, LTD, (referred to herein as "Plaintiff" or "SPENCER PLANTATION") and makes and files this its Response to Defendant, MICHAEL A. McCANN's filing entitled "MOTION FOR FRCP 12(b)(6) FAILURE TO STATE A CLAIM" (hereinafter referred to as "McCann's 12(b)(6) Motion"); and in support thereof, would respectfully show the Court the following:

I.

Background

1.01 McCann appears to acknowledge awareness of the *substance* of the instant case, when he admits in McCann's 12(b)(6) Motion (*see* seventh, eighth and ninth unnumbered paragraphs on p. 2 of McCann's 12(b)(6) Motion) that the action before this Court, on removal "...can only be construed to be a suit for forcible detainer."

1.02 McCann proceeds to suggest that "SPENCER has not met the requirements necessary for a petition in forcible detainer." (*see*, ninth unnumbered paragraph on p. 2 of McCann's 12(b)(6) Motion), alleging further that SPENCER PLANTATION has not included a description of the premises of which it seeks possession, has not included a description of when and how a current notice to vacate was delivered.

1.03 McCann further acknowledges that "the action before this Court is an appeal from a Brazoria Justice Court, thus, it is a *de novo*, hearing." (*see*, seventh unnumbered paragraph on p. 2 of McCann's 12(b)(6) Motion), further alleging that "there has been no trial on the merits in the case that is now pending before this Court". (*see*, fifth unnumbered paragraph on p. 2 of McCann's 12(b)(6) Motion).

1.04 McCann is correct in his admission that this case is an action in forcible detainer, initiated on December 10, 2014 with the filing by SPENCER PLANTATION of its original petition with the clerk of the Justice Court, Precinct 4, Place 2, Brazoria County, Texas) this case is herein referred to as the "Forcible Detainer Case"). McCann was served with

citation/summons in that proceeding, on December 11, 2014, At the Justice Court, the Forcible Detainer Case was tried in the Justice Court, and SPENCER PLANTATION prevailed.

1.05 On January 5, 2015, McCann then initiated an appeal of the judgment in the Forcible Detainer Case, from the Justice Court, to the County Court at Law No. 1 of Brazoria County, Texas.

1.06 On February 22. 2016, Plaintiff-SPENCER PLANTATION filed is Plaintiff's First Amended Original Petition in the Forcible Detainer Case. A true and correct copy of that pleading (omitting exhibits) is attached hereto, marked ATTACHMENT A).

II.

2.01 FAILURE TO STATE A CLAIM: Plaintiff-SPENCER PLANTATION has pleaded a very well known "cause of action", in forcible detainer, against McCann, seeking to recover *possession* of a certain parcel of land. The pleading asserting this cause of action is attached, and satisfies all required elements. See ATTACHMENT A.

2.02 The attached pleading in the Forcible Detainer Case negates McCann's allegation in McCann's 12(b)(6) Motion that Plaintiff-SPENCER PLANTATION, has failed to state a claim, viable under the law.

Prayer

WHEREFORE, PREMISES CONSIDERED, the Plaintiff, SPENCER PLANTATION, prays that, this Court remand this proceeding to the County Court at Law No. 1 of Brazoria County, Texas, and that it have all other relief to which Plaintiff is entitled.

Respectfully submitted,

STEVENS & RAU, P.C.
A Professional Corporation

By: /s/ George H. Rau, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Response has been served upon the following via method noted, on this the 12 day of April, 2018:

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Served: Via E-Mail: drmccann@brazoriainet.com

By: /s/ George H. Rau, Jr.
George H. Rau, Jr.